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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 63

ALLIED PAINT & COLOR WORKS, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR RESPONDENT

This memorandum is filed in response to the Court's request that both parties comment on the questions of reformation of the contract involved in this case.

1. Petitioner brought this action against the United States for damages for an asserted breach of contract arising out of the performance of two contracts with the United States, both of which contained a standard disputes clause. Under the first contract, petitioner was obliged to deliver to the government a specified number of paint kits; the government, for its part, was to furnish petitioner one of the components of the kits, *i.e.*, a sufficient quantity of phosphorescent paint (Pet. App. 2a). That contract, awarded pursuant to an invitation to bid, also provided that peti-

tioner was to bear the risk of loss on the government-furnished property delivered to it (Pet. App. 3a). When the government was unable to deliver all of the necessary phosphorescent paint, the parties negotiated a second contract, whereby petitioner would furnish the additional amount required for completion of the first contract (Pet. App. 3a–4a). The second contract contained no schedule requiring the government to furnish any material or supplies for use on that contract, but it did include a standard clause for negotiated contracts which imposed the risk of loss of government-furnished property upon the United States (Pet. App. 4a–5a).

Petitioner thereupon manufactured 1,118 quarts of the phosphorescent paint, which was inspected and accepted by the government and left with petitioner for use on the first contract (Pet. App. 5a). This paint was subsequently destroyed by a fire at petitioner's plant (Pet. App. 6a). Petitioner replaced the paint by purchases in the open market and made claim for reimbursement (Pet. App. 8a).

The contracting officer denied the claim, finding that the paint, upon its acceptance, constituted government-furnished property covered by the initial contract and that petitioner therefore bore the risk of loss (Pet. App. 6a). Petitioner, pursuant to the disputes clause of its contracts, appealed to a panel of the Armed Services Board of Contract Appeals, which permitted petitioner to introduce all of the evidence it wished to present (Pet. App. 11a). Neither the government nor petitioner requested reformation of either of the contracts. The Board

sustained the contracting officer's findings as against petitioner's contentions (1) that the second contract was intended to supersede or modify the first and (2) that the government had not in fact supplied the paint for use on the first contract (Pet. App. 6a–7a).

Petitioner thereupon brought this suit in the district court under the Tucker Act (28 U.S.C. 1346(a)(2)), alleging that the government failed to deliver the paint which it was obliged to furnish under the first contract (Pet. App. 2a). Petitioner asserted that the decision of the Board was not supported by substantial evidence and was based upon errors of law (App. 5a–6a).[1] Again, neither party requested reformation of either agreement (App. 4a–9a).

After answer, the government moved for an order directing that review be limited to the administrative record (Pet. App. 8a–9a). Petitioner opposed on the ground that the case involved an issue of law (interpretation of the contracts) and that it was entitled to present evidence on the issues of fact related thereto (App. 11a). It did not contend that it had been precluded from presenting evidence to the Board or that it had newly discovered evidence. Indeed, it failed to point out what additional evidence it desired to offer (Pet. App. 12a). The district court, by memorandum opinion, limited review to the administrative record (App. 10a–12a).

In a later opinion (App. 13a–17a, 199 F. Su[illegible] p. 285), the court ruled that the second contract did not supersede or modify the first, and that the standard

[1] "App." references are to the printed Appendix for Appellant filed in the court of appeals.

government-furnished property clause of the second was not intended to cover paint to be manufactured by petitioner under that contract (Pet. App. 9a). The court also sustained, as supported by substantial evidence, the Board's finding that the government, by accepting the paint manufactured under the second contract and leaving it with petitioner, had furnished it to petitioner for performance on the first contract. Accordingly, it ruled that the risk of loss was on petitioner and denied recovery (Pet. App. 9a–10a).

In the court of appeals, shortly after the decision in *Blake Construction Co.* v. *United States*, 296 F. 2d 393 (C.A.D.C.), petitioner contended for the first time that there was an issue of reformation of the contract which justified the taking of additional evidence. The government urged that, since this issue had not been raised administratively or in the district court, it could not be raised for the first time on appeal and that there was, in any event, no issue of reformation involved.

The court of appeals affirmed. It held that the district court had correctly limited review to the administrative record, which had been made on the basis of a full hearing (Pet. App. 10a–12a). It also approved the interpretation of the two contracts adopted by the Board and the district court (Pet. App. 12a–13a). Apparently accepting the government's view that reformation had not been properly raised and was not involved, the court made no mention of that subject (Pet. App. 1a–13a).

2. In seeking review in this Court, petitioner asserted conflicts with the Court of Claims' decision in

Carlo Bianchi and Company, Inc. v. *United States*, 144 Ct. Cl. 500, and with *Blake Construction Company* v. *United States*, 296 F. 2d 393 (C.A.D.C.). Conceding that there was a conflict with the former case, the United States did not oppose grant of the writ but suggested that it might be appropriate to defer action on the petition pending this Court's disposition of the *Bianchi* case.

The issue in *Bianchi* was whether the Wunderlich Act limits the trial court to review of the administrative record in resolving a controversy within the standard disputes clause of a government contract. This Court has now answered that question affirmatively, upholding the practice which has generally prevailed in the district courts and in the courts of appeals and rejecting the practice of the Court of Claims which has permitted trial *de novo*. *United States* v. *Bianchi and Company, Inc.*, Oct. Term, 1962, No. 529, decided June 3, 1963.

In the *Blake Construction* case, *supra*, the District of Columbia Circuit held that a determination which was outside "agency expertise," *i.e.*, whether there were grounds for reformation of a contract, should be made by the district court. The decision distinguished this type of determination from issues as to excessiveness of profits and performance in conformity with contract specifications—issues which the court regarded as appropriate for disposition by the administrative boards.

2. Petitioner's claim that the instant case raises an issue of reformation and comes within the rationale of the *Blake Construction* case was made for the first time in the court of appeals. That circumstance

alone would justify the court of appeals' failure to pass upon the contention. *United States* v. *Tucker Truck Lines*, 344 U.S. 33; *Hormel* v. *Helvering*, 312 U.S. 552. But we do not stand on that point alone. Petitioner's claim that there is now an issue as to reformation is based upon a misuse of that term. It says (Pet. 10) that the district court, which had the problem of interpreting and reconciling contracts 1 and 2, "reformed the contract" by disregarding the import of certain language in the second contract. This is nothing more than an assertion that the three tribunals which have passed upon the meaning of the contracts have misinterpreted them.

The short of the matter is that the action brought in the district court is not one to reform the contracts but, rather, one to recover on the contracts *as written* (App. 4a–6a).[2] At no point has there been a suggestion that the parties mistakenly omitted language from the contracts or inadvertently used words that were not intended to be included. On the contrary, each contended throughout the administrative hearings and the subsequent litigation that the language of the contracts supported its conclusion. The situation has nothing in common with the *Blake Construction* case, in which the administrative board

[2] Petitioner's suggestion that it did not introduce evidence as to the intent of the parties because the Board was without jurisdiction to reform the contract (Pet. 11–12) is contradicted by the record here. The intent of the parties was the only issue before the Board and the evidence introduced there all went to that issue (see Pet. App. 8a). Moreover, petitioner's complaint in the district court did not seek reformation.

found that the written contract failed to contain a clause which the parties meant to insert.

4. The instant case, to be sure, does involve the issue (although petitioner has not raised it in these terms) whether evidence bearing upon a dispute as to the proper interpretation of a contract (or of specifications in a contract) may be presented to the trial court *de novo*, albeit the matter has once been heard (or opportunity to present the evidence has been afforded) in the administrative proceedings. Our view on that question is that there should not be repetitive hearings.

It is obvious, we think, that if boards of contract appeals are to adjudicate questions of fact (as the parties in terms provide when they sign a contract containing the disputes clause), they must necessarily determine, in the first instance, the meaning of the contract. One cannot determine, for example, whether a contractual provision has been satisfied or a specification has been met until one decides what the provision or specification means. Characteristically, questions of interpretation and of performance are inextricably bound together. If the case is one in which the meaning of the agreement may be determined solely by reference to the language within the four corners of the instrument, there is of course no question as to the taking of evidence. Nor is there any difficulty in the way of a subsequent judicial determination of the question whether the agency's interpretation was a permissible one.

But what of the case in which it is necessary or appropriate to resort to extrinsic aids, for example, the case where one party to the contract argues that a crucial term has a special meaning in the trade and that the parties intended this meaning, rather than some other meaning, to control? Should the evidence bearing upon that question be heard *de novo* in the trial court? We think not—and not only because a duplication of the hearing process is a wasteful one, but also because the Wunderlich Act, far from requiring such a result, points in the contrary direction. Under that Act, an administrative determination of fact is conclusive if supported by substantial evidence, while an administrative decision on a question of law is not to be deemed final. 41 U.S.C. 321, 322. When a tribunal resorts to extrinsic aids, it would seem plain, virtually as a matter of definition, that there is a disputed fact to be resolved—evidence relates to facts—and that, at the least, the administrative determination of the precise question to which that evidence is addressed is a factual one.[3] The same point frequently arises in deciding upon the proper alloca-

[3] In *United States* v. *Wunderlich*, 342 U.S. 98, the Court of Claims had based its refusal to give effect to the administrative determination on the ground that the dispute was one of interpretation of a contract and was a question of law not covered by the disputes clause (117 Ct. Cl. 92, 212–214). This Court reversed after the contractor had conceded that the dispute was one of fact and covered by the disputes clause. 342 U.S. at 99. Even where there is no extrinsic evidence necessary to determine the intent of the parties, "there is much to be said for the argument that the 'interpretation' [of a contract] presents a question of fact." *United States* v. *Moorman*, 338 U.S. 457, 462; 3 Williston, *Contracts* (rev. ed., 1936) § 616.

tion of functions as between judge and jury.[4] As this Court stated in *Rankin* v. *Fidelity Trust Co.*, 189 U.S. 242, 252–253:

> * * * Although the construction of written instruments is one for the court, where the case turns upon the proper conclusions to be drawn from a series of letters, particularly of a commercial character, taken in connection with other facts and circumstances, it is one which is properly referred to a jury. * * *

See, also, *West* v. *Smith*, 101 U.S. 263, 269–270.[5]

We recognize that it has been the settled view of the Court of Claims that it might retry an issue of fact subsidiary to a question of contractual interpretation.[6] But it is not clear that this conflict is a live one. In the first place, the Court of Claims, until this Court's decision in the *Bianchi* case, regarded itself as free to try *de novo any* issue heard in the

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[4] Actually, the role of the administrative tribunal in cases arising under the disputes clause and the Wunderlich Act may be somewhat broader than that of a jury in regard to the interpretation of contractual specifications, drawings and other detailed provisions. See *Salem Products Corp.* v. *United States*, 298 F. 2d 808, 810 (C.A. 2); cf. *Kayfield Const. Corp.* v. *United States*, 278 F. 2d 217 (C.A. 2).

[5] The logic of the argument set forth in the text raises questions as to the correctness of the District of Columbia Circuit's decision in the *Blake Construction* case, *supra*. Whether the parties to that contract inadvertently omitted a provision they meant to include is also a question of fact. However, the *Blake* decision, whatever its merit, is expressly limited to questions involving reformation of contracts—an issue not presented, as we have argued above, in the instant case.

[6] See, *contra*, *Lowell O. West Lumber Sales* v. *United States*, 270 F. 2d 12 (C.A. 9), and *United States* v. *A. J. McKinnon*, 289 F. 2d 966 (C.A. 9).

administrative proceedings. Secondly, a very recent decision of that court indicates that it will re-examine the question which we have discussed immediately above in the light of *Bianchi*. In *Stein Bros. Mfg. Co.* v. *United States*, No. 389–59, decided July 12, 1963, the court stated (slip op., p. 2):

> The ultimate issue in the case, relating to the meaning of the contract specifications, is one of law not of fact * * * [citing cases]; that being so, it may very well be that this court is not precluded by the *Bianchi* decision or the Wunderlich Act (41 U.S.C. §§ 321–322) from considering any evidence bearing on that legal issue, no matter what the Board of Contract Appeals determined or what was in the record before it. But we need not face that issue in the present case since there is another ground on which we can properly consider the new evidence without in any way flouting the Supreme Court's ruling. * * *

Doubtless, the lower courts will have further occasion to consider the reach of the *Bianchi* decision and its application to variant situations. These questions, however, are not in our view ripe for review. The only clear conflict which the instant case presented has been resolved, we submit, by the *Bianchi* decision. For these reasons we believe that the petition herein should be denied.

ARCHIBALD COX,
Solicitor General.

AUGUST 1963.